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STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 06-05-13 APPLICATION OF CIVIL LIBERTIES UNION OF CT (ACLU-CT) FOR INVESTIGATION OF AT&T AND VERIZON REGARDING DISCLOSURE OF CT CUSTOMER INFORMATION AND REQUEST FOR RULE MAKING

March 7, 2007

By the following Commissioners:

Anthony J. Palermino
Anne C. George
Donald W. Downes

DRAFT DECISION

This draft Decision is being distributed to the parties in this proceeding for comment. The proposed Decision is not a final Decision of the Department. The Department will consider the parties' arguments and exceptions before reaching a final Decision. The final Decision may differ from the proposed Decision. Therefore, this draft Decision does not establish any precedent and does not necessarily represent the Department's final conclusion.

I. INTRODUCTION

A. BACKGROUND OF THE PROCEEDING

The Department of Public Utility Control (Department) has initiated the above noted docket in response to the American Civil Liberties Union of Connecticut's (ACLU-CT) complaint filed with the Department on May 24, 2006 (Complaint). According to the Complaint, the ACLU-CT believes that AT&T Connecticut and AT&T Woodbury (collectively, AT&T) and Verizon New York (Verizon, together, the Companies) may

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have violated Connecticut law by providing customer proprietary network information (CPNI) to the National Security Agency (NSA) without warrants, court orders, subpoenas or subscriber permission. (Complaint, pp. 1 and 2).

B. Parties and Intervenors

The Department recognized the American Civil Liberties Union of Connecticut, 32 Grand Street, Hartford Connecticut 06106; The Southern New England Telephone Company d/b/a AT&T Connecticut and the Woodbury Telephone Company d/b/a AT&T Woodbury, 310 Orange Street, New Haven, Connecticut 06510; Verizon New York Inc., 140 West Street, New York, New York 10007; and the Office of Consumer Counsel (OCC), Ten Franklin Square, New Britain, Connecticut 06051 as parties to this proceeding. The Attorney General of the State of Connecticut (AG) requested and was granted intervenor status.

C. Conduct of the Proceeding

In response to the Complaint, the Department issued a Notice of Written Comments and Reply Comments (Notice) from interested persons addressing the May 24, 2006 filing.

On September 6, 2006, AT&T Corporation, the Companies and the Department were sued by the United States in the United States District Court for the District of Connecticut (District Court) in connection with some ACLU-CT interrogatories.[1] The subject interrogatories requested information regarding, inter alia, the companies' policies for releasing CPNI to entities including law enforcement agencies and governmental agencies. In the lawsuit, the United States has asserted that federal law prohibits furnishing information that may be responsive to those interrogatories. The United States has therefore requested that the District Court issue a declaratory judgment that the Department may not enforce an August 23, 2006 directive requiring AT&T and Verizon to respond to the ACLU-CT interrogatories.

By Notice of Hearing dated July 21, 2006 and Notice of Rescheduled Hearing dated August 24, 2006, a public hearing was convened at the Department's offices on September 21, 2006. During that hearing, the parties and intervenors were directed to brief various issues including: whether the Department has jurisdiction over this matter, and if so, under what Connecticut statute. Tr. 9/21/06, pp. 22 and 23. The parties and intervenors were also directed to brief the remedy sought by the applicant and whether the Department has jurisdiction under its statutes to issue the remedy that is being requested. Id., p. 23. A third issue that was directed to be briefed concerned to whom or to what entity does the privilege under a claim of national security run and who holds the privilege. Id. Finally, the parties and intervenors were directed to brief whether the privilege had been waived or otherwise voided by any conduct of the privilege holder. Id.

II. DEPARTMENT ANALYSIS

[1] See The United States of America v. Anthony J. Palermino, et al., Civil Action No. 3:06-cv-01405-JBA.

The Department received briefs from all the parties and heard oral arguments, on January 17, 2007, regarding the requested briefing issues and has considered all the arguments and citations proffered by the parties. The Department hereby outlines its determinations for each issue below.

A. JURISDICTION

It is undisputed that pursuant to the Communications Act of 1934, 47 U.S.C. §201, (The Act) the individual States have jurisdiction over the regulation of intrastate telecommunications issues. Verizon and AT&T are public service companies as defined in §16-1 of the General Statutes of Connecticut (Conn. Gen. Stat.). The Department has been granted authority pursuant to numerous statutes to regulate Connecticut public service companies. In particular, Conn. Gen. Stat. §16-11 provides the Department with plenary authority to regulate all aspects of the manner of operation of Connecticut public service companies. In Greenwich v. Department of Public Utility Control 219 Conn. 121,125-126, 592 A. 2nd 372 (1991), (Greenwich), the Court held that the enabling statutes, such as Conn. Gen. Stat. §16-11, demonstrate a legislative intent to rely on the expertise of the Department to regulate and supervise public service companies. The Greenwich Court further found that the Department has the flexibility to establish policies to protect the public interest.

Additionally, Conn. Gen. Stat. §16-247 f (a) provides that "… [t]he Department shall regulate the provision of telecommunication services in the state in a manner that will foster competition and protect the public interest." The Court in Southern New England Telephone Company v. Department of Public Utility Control 261 Conn. 1, 22, 803 A2nd 879 (2002) held that the Connecticut legislature gave the Department a broad grant of authority to regulate telecommunication services in Connecticut. It is incontrovertible that the treatment of Connecticut customers' CPNI by intrastate telecommunications companies affects the pubic interest and is therefore within the Department's authority to investigate.

Furthermore, both Verizon and AT&T have established privacy policies concerning their respective CPNI. Verizon and AT&T may have violated their own privacy policies by releasing CPNI to the government authorities without proper warrant or order.[2] The detrimental effect of this alleged violation on Connecticut customers' CPNI is solidly within the Department's purview to investigate and enforce.

Finally, pursuant to Conn. Gen. Stat.§16-6b the Department has the authority to adopt regulations with respect to, inter alia, the conduct of operations of public service companies as it deems reasonable and necessary. It is evident that the manner in which telecommunications companies may treat Connecticut customers' CPNI relates to the "operations" of a public service company and is therefore an appropriate issue for which the Department may promulgate regulations.

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[2] The Department notes that there have been several instances when Southern New England Telephone Company (now AT&T) initially refused to provide the Department with CPNI information during investigations of consumer complaints.

Contrary to the assertions of AT&T and Verizon as well as the United States of America (United States) in the United States District Court of Connecticut (District Court) that the Department is seeking to "intrude on foreign intelligence gathering and military activities," (AT&T Reply Brief 10/24/06 p. 23) the initiation of this docket is to investigate the alleged illegal disclosure of Connecticut customers' CPNI information to the NSA. The intent is not, nor has it ever been, to investigate the operations of the Federal Government or foreign intelligence activities. In the instant investigation, the Department seeks information as to whether AT&T and Verizon disclosed CPNI or records to private parties, government entities or law enforcement personnel **when not compelled to do so by subpoena, court order, warrant or on request** under 18 U.S.C. §2709 (NSL), the details of instances when CPNI was released to such entities and whether the companies had privacy policies during the relevant period of time concerning the disclosure of CPNI without being compelled to do so. This information is germane to the issue of whether AT&T and Verizon **illegally** disclosed Connecticut customer records to private parties, government entities and law enforcement personnel.

Based on the applicable statutes and the stated intent of the instant proceeding, the Department has determined that it has the jurisdiction to proceed with its investigation, since the matter of illegal disclosure of Connecticut customers' CPNI by intrastate telecommunications companies is within Department jurisdiction to investigate.

B. PREEMPTION

Verizon and AT&T as well as the United States claim that even if the Department has jurisdiction to conduct its investigation of alleged violations of CPNI, it is preempted from doing so by federal law. Specifically AT&T stated that "… [t]his subject matter is preempted by federal law from state investigation or regulation. As an initial matter…the United States Constitution divests the states of all authority to investigate, oversee, or regulate federal military or intelligence activities." (AT&T Reply Brief 10/24/06 p. 23). However, the Department believes that it is not preempted from conducting its investigation in this proceeding. AT&T's assertion that the Department intends to investigate or attempt to regulate federal military or intelligence activities is clearly erroneous. As stated above, the intent of the instant proceeding is to determine whether AT&T and Verizon violated Connecticut customers' rights by illegally releasing CPNI to a government entity. The instant Department investigation does not usurp the federal government's control over foreign intelligence matters. There is no express Congressional intent to preempt states from adjudicating violations of applicable state law regarding disclosure of state customers' CPNI.

States have exercised jurisdiction over intrastate related telecommunications matters since the passage of the Telecommunications Act of 1934. Since the instant proceeding is focused on possible violations of state law, which is clearly within the Department's jurisdiction, and there is no express preemption regarding the adjudication of alleged violations of Connecticut customer's CPNI by intrastate telecommunications companies, the Department finds that it is not preempted from conducting its investigation in the instant proceeding.

C. Remedy

The Department also sought comment on whether it could provide a remedy if the alleged violations were sustained. Although the Department does not have the authority to provide damages to the applicant, the Department has authority pursuant to Conn. Gen. Stat. §§16-41 and 16-247g to fine telecommunications companies that violate state statutes, regulations or Department orders. Therefore, if the Department determines that the alleged violations did occur, it may issue appropriate orders and issue fines as provided for in the applicable statutes.

D. Privilege

Finally, the Department sought comment on the issue as to what entity may exercise the national security privilege. It is clear that the privilege runs to the United States. It is also clear that the United States has not exercised the privilege in the instant proceeding. AT&T and Verizon are not the appropriate entities to invoke the privilege. Since the privilege has not been properly invoked in the instant proceeding, the Department need not at this time determine whether the privilege has been waived. Accordingly, the Department concludes that, the national security privilege is inapplicable in the instant proceeding.

E. Regulations

The Department, pursuant to Conn. Gen. Stat. §§16-6b and 16-246g has the authority to promulgate regulations regarding the operations of telecommunications providers in Connecticut. Since the issue of disclosure of CPNI is within the Department's purview to regulate, the Department concludes that it may promulgate regulations regarding the disclosure of CPNI by telecommunication providers.

F. Conclusion

Based on the foregoing, the Department concludes that it has jurisdiction to proceed with its investigation and rulemaking and is not preempted from proceeding with either docket. The Department further finds that the national security privilege has not been properly invoked by the appropriate entity in this proceeding and is therefore not at issue at this time. Additionally, the Department concludes that if the alleged violations are sustained it has authority, pursuant to Conn. Gen. Stat. §§16-41 and 16-247g, to issue fines for such violations. Accordingly, the Department will proceed with its investigation in this matter and will issue a procedural order outlining further action on this investigatory docket as well as the rulemaking proceeding.

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This Decision is adopted by the following Commissioners:

Anthony J. Palermino

Anne C. George

Donald W. Downes

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

Date